of the notice of appeal and service thereof, even if effected immediately after October 14 (which they were) must be more than 1 month from the order appealed from.

The answer of counsel for the respondents is that as from September 6, 1976, the appellant could avail herself of the procedure under this rule and order, but it was not mandatory for her to do so. She could proceed on appeal without going through the process of making further arguments. With respect, this answer appears to require prescience which litigants or counsel should be well advised to have, if they were not to have to meet objections of every possible nature and form. Unfortunately however such prescience is often only hind-sight. Further arguments may well not be mandatory, but they are available and if a litigant, for good reasons, one of which appears clearly to be the saving of costs, chooses to avail herself of them, then she should not be shut out of further process, if this process has to be taken.

On a fuller consideration, we are of the view that however final in terms the order of September 6, 1976, may be, in practical effect, it could not be acted upon until the decision of the learned judge on the further arguments or his decision not to require further arguments was made known. He could have heard such further arguments and then he could confirm his previous decision or revoke it or make such further or other order as he deemed just. In the latter event and in the event he decided not to hear further arguments, the fact that the order made in chambers had been drawn up and perfected (as this one was) would have no significance. If on the other hand, he decided to confirm the order, the sale would take place unless an appeal was filed and a stay ordered. But if on the day fixed for the sale of the charged lands, he had not made known his decision to confirm the order, then quite clearly the sale could not be carried out, and it would have to be adjourned till such time as his decision was made known. The same position would be arrived at, if by that time, he had not made known his decision on the further arguments or he had not decided whether to hear further arguments. In other words, the situation stagnated until his decision one way or the other was made known. The matter could only proceed from his decision. Clearly then, in the case of a decision not to require further arguments, the process of appeal could only commence from the date of his decision.

We therefore rule that in the case of an order made in chambers in which an application under Order 54 rule 22A has been lodged within time, the time to appeal runs from the date, not of the order but of the decision not to require further arguments, and that on the facts of this case, an appeal has been properly brought to this court.

The preliminary objection is dismissed with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

LEN OMNIBUS CO. BHD. v. NORTH SOUTH TRANSPORT SDN. BHD. & ANOR. AND ANOTHER APPEAL

[F.C. (Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman and Chang Min Tat F.JJ.) May 31 and August 19, 1978]
[Kuala Lumpur — Federal Court Civil Appeals Nos. 223 and 226 of 1977]

Tort — Negligence — Nuisance — Head-on collision between bus and lorry — Rubber tree falling across road — Motor lorry travelling on incorrect side of road — Whether duty of bus driver to stop or avoid accident — Whether owner of estate on which rubber tree stood liable because of negligence or nuisance — Nuisance to highways — Duty of owner of adjoining land.

In this case there had been a head-on collision between the appellant's motor bus and the respondent's motor lorry. A rubber tree had fallen in a storm and was lying across the motor lorry's side of the road. The other side on the motor bus's side was clear. It appeared that the collision occurred as a result of the lorry travelling on its incorrect side in an attempt to proceed past the fallen tree. The learned trial judge found that the driver of the lorry was negligent in doing so in complete disregard of the presence of the bus which was on its correct side of the road. He held however that the driver of the motor bus was also negligent as he ought to have stopped the bus on seeing that the lorry had begun to encroach into its path. He held that the lorry-driver was 75% to blame and that the bus-driver was 25% to blame. The learned trial judge also held that the third party, the owner of the rubber tree, was exonerated from blame. The parties appealed to the Federal Court.

Held: (1) on the facts the lorry driver was wholly to blame for the accident;

(2) the learned judge should not have held that it was negligent of the bus driver not to have stopped his vehicle some distance back when he saw the lorry coming towards him on its incorrect side of the road nor should the bus driver be regarded as blameworthy in not going to the left grass side table in an endeavour to let the lorry pass;

(3) the learned judge was wrong in his finding and in that exceptional situation the appeal court was justified in interfering with his apportionment of liability;

(4) an estate owner who had rubber trees growing on his estate adjoining the highway was not expected to possess scientific knowledge of diseases that might affect the trees but he would be expected as a reasonable and prudent landowner to inspect the trees from time to time to assess their safety and if there was a danger of one of those trees falling on the highway and possibly injuring someone who was using the highway, it was his duty to have that tree removed which was found to be dangerous;

(5) if a tree adjoining a highway fell on the road without any negligence on the part of its owner, and the said tree caused on obstruction to the said highway, it was wrong to suppose that *ipso facto* and immediately a nuisance was created. The keynote of his responsibility would be knowledge or means of knowledge. Thus nuisance would be created if, knowing or having the means of knowing of its existence, he allowed it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that obstruction had come into existence could not overnight turn it into a nuisance;

(6) on the facts of this case the evidence did not show that the estate owner was negligent or that he could be made liable in nuisance.

Cases referred to:-

(1) *K.R. Taxi Service Ltd.* v. *Zaharah* [1969] 1 M.L.J. 49.
(2) *Govinda Raju* v. *Laws* [1966] 1 M.L.J. 188.
(3) *Lim Kar Bee* v. *Abdul Latif bin Ismail* [1978] 1 M.L.J. 109, 119.
(4) *U.S. Shipping Board* v. *Laird Line Ltd.* [1924] A.C. 286, 291.
(5) *Ramoo* v. *Gan Soo Swee & Anor* [1971] 1 M.L.J. 235, 239.

(6) *Caminer* v. *Northern and London Investment Trust Ltd.* [1951] A.C. 88.

(7) *Thean Chew* v. *The Seaport (Selangor) Rubber Estate Ltd.* [1960] M.L.J. 166.

FEDERAL COURT.

Khoo Eng Chin (*P.P. Sangarananda* with him) for the appellant in F.C. Civil Appeal No. 223/77 and 1st respondent in F.C. Civil Appeal No. 226/77.

Kok Wee Kiat (*V. Krishnan* with him) for 1st respondent in F.C. Civil Appeal No. 223/77 and appellant in F.C. Civil Appeal No. 226/77.

C. Abraham for the second respondent in both appeals.

Raja Azlan Shah Ag. C.J. (Malaya): This is a consolidated appeal against the decision of the learned judge sitting at Kuala Lumpur to the effect that the appellants were partly to blame for the nasty head-on collision between their motor bus and the respondents' motor lorry at the 25th milestone Kuala Lumpur/Ipoh main highway and that the third party was exonerated from blame because one of its rubber trees standing on its estate adjoining the highway fell on the said highway.

The appellants brought this action against the respondents and recovered judgment for $45,000 for damages and other consequential loss suffered by them. The learned trial judge held that the respondents were 75% to blame and that the appellants were 25% to blame. They now say that the respondents were wholly to blame for the accident and that they should recover judgment for the full amount of $60,000 the quantum agreed on a 100% liability.

The accident occurred at about 10.40 p.m. The road had no street light. At the time of the collision a rubber tree adjoining the highway and belonging to the third party had fallen and was lying across the motor lorry's side of the road. The other half of the road, that is, on the motor bus' side, was clear.

The road at that particular stretch was straight. As one faces Ipoh the left grass side table measured 11 ft. 9 ins. with tall grass and trees immediately after it; the right side table measured 14 ft. until it reached the high bank of a rubber estate belonging to the third party.

The motor bus was carrying passengers. The motor lorry was carrying goods. Both the drivers of the two vehicles were killed on the spot. Several passengers in the motor bus were killed and/or injured. Neither the bus conductor nor the lorry attendant could assist the court as to how the accident occurred.

On the version of the silent evidence which the learned judge accepted, it appears that the collision took place as a result of the lorry travelling on its incorrect side of the road in an attempt to proceed past the fallen tree in complete disregard of the presence of the bus which was consistently on its correct side of the road. But he held that the motor bus ought to have stopped on seeing that the lorry had begun to encroach into his path, and that if it had done so, the head-on collision would have been avoided. In those circumstances he concluded that the lorry driver's negligence was the substantial but not the sole cause of the accident, and that the bus driver had also been negligent, although to a lesser extent. He was of the view that the bus driver had failed to exercise a very "high" degree of care when driving a very large vehicle as the bus in question in not keeping a proper look out. He seems to have in mind the proposition that those first in time have priority on the road no matter whether they are to blame or not.

According to the evidence the bus had stopped some 200 yards before the spot of the collision to alight passengers. It then proceeded on its way and it is here that the evidence of Encik Mahinder Singh, an advocate and solicitor, assumes much importance and this has not been missed by the learned judge. He said he was following the bus and wanted to overtake it at the 25th milestone but could not do so as he was unable to see in front of him on his offside. He noticed the bus was moving towards the left grass verge and its nearside tyres were near the grass verge. He then noticed rays of light coming from the front and through something that was on the road. He stopped his car on the right side of the road, i.e., his incorrect side. The bus was still moving slowly. The next thing there was an explosion and the lorry landed and overturned about 35-40 yards in front of him on his left. At the time of the explosion he was about 100-200 ft. away from the bus. He said the tree covered about two-thirds of the road, and the branches extended beyond the centre white line. In cross-examination he said he was travelling at 35-40 m.p.h. The bus was travelling around 35 m.p.h. At that time he had the impression that the lorry was coming very fast. In answer to a question by the court he said he stopped his car because of the obstruction and he could not see in front of him. He said the bus driver would be in a better position to see the obstruction. He further said the bus reduced speed considerably but it still proceeded on.

The learned judge accepted the version of Encik Mahinder Singh and concluded that the bus driver was travelling fast in the circumstances of the case, and that he should have stopped as Encik Mahinder Singh did.

It was submitted on behalf of the appellants that the learned judge was wrong in two aspects. First there was no evidence of speed. Even relying on the evidence of Encik Mahinder Singh, the bus could not be said to be travelling fast. Secondly, the bus driver who was driving his vehicle on its correct side of the road was under no obligation to stop it because it had a reasonably clear passage in front of him. Encik Mahinder Singh supports this aspect of the case for he said that the bus driver would be in a better position to see the obstruction. Encik Mahinder Singh stopped as he did because he could not overtake the bus in view of the obstruction in front of him. Encik Mahinder Singh was faced with a difficult situation. But not the bus driver. If the evidence of Encik Mahinder Singh were to be accepted, and the learned judge accepted his version, it was at this time that the collision took place — at or near the position of the fallen tree.

In my opinion the submission of counsel for the appellants is correct. There is evidence that the bus driver had reduced speed considerably before the impact. He had seen the fallen tree. But he did not expect the on-coming lorry to encroach into his path in order to pass it. The bus driver driving his vehicle along a straight stretch of road and on his correct side was justified in assuming that the on-coming lorry would keep to its side and would not encroach into the former's path. By so doing the lorry had put the bus into a situation of extreme peril and it is idle to say that if the bus driver had acted rashly in the agony of the moment he was guilty of contributory negligence. In those circumstances the bus driver was not expected to behave like a superman: (see *K.R. Taxi Service Ltd.* v. *Zaharah*[1]). We are only too familiar with cases of collision being brought about by rashness owing to want of due consideration as to the act to be done: (see *Govinda Raju* v. *Laws*[2]). I would reiterate the remark I made in *Lim Kar Bee* v. *Abdul Latif bin Ismail*[3]: "The law is content to take the cavalier view that a driver of a motor car travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner." There is no reasonable guarantee that if the bus had stopped a collision would have been avoided. The lorry may still have maintained its course on the incorrect side of the road. There is also doubt as to whether there was sufficient room to negotiate safely on the left grass side table. Some of the photographs and the sketch plan suggest there was but there is evidence that there were tall grass and trees immediately after it. Consequently I am unable to say with any degree of assurance that the appellants were guilty of contributory negligence. To hold, as the learned judge did, that it was negligent of the bus driver not to have stopped his vehicle some distance back when he saw the lorry coming towards him on its incorrect side of the road was not a finding which should have been made nor should he be regarded as blameworthy in not going to the left grass side table in an endeavour to let the lorry pass. With all respect to the learned judge, I am unable to agree with his conclusion that, in the emergency which faced him, the bus driver acted negligently. Reference might be aptly made to a passage from the speech of Lord Dunedin in *U.S. Shipping Board* v. *Laird Line, Ltd.*[4] that "it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger".

I am constrained to say that the learned judge was wrong. In that exceptional situation this court is justified in interfering with an apportionment of liability: per Lord Cross in *Ramoo* v. *Gan Soo Swee & Anor.*[5]

The respondents by their pleadings claimed that they were entitled to contribution and/or to be indemnified by the third party against the claim of the appellants. They alleged that the fall of the rubber tree on the said highway was occasioned by reason of the negligence of the third party. Alternatively they alleged that the third party had created a public nuisance by leaving in the dark an unlighted tree obstructing the highway without any proper warning sign.

Amongst the several particulars of negligence pleaded, only one in my opinion is worthy of consideration and determination, viz., permitting the said rubber tree to become or to remain in a defective or dangerous condition, so that it was liable to and did in fact fall on the said road.

The learned judge dealt with the issue stating as his reason for dismissing the claim in negligence the unusually bad weather condition, in particular the heavy rain that had fallen in the last three days of August and the first seven days of September causing the ground to become saturated coupled with the condition of the tree top which had become heavier caused by the retention of rain water on the canopy or foliage with the result that slight wind would had been sufficient to topple the tree over. He came to the conclusion that the third party had kept a reasonable look out and had taken reasonable steps to look for signs or symptoms of root disease. He found as a fact that the particular tree was not suffering from any root disease.

In this court the respondents did not press on the issue of negligence beyond complaining in the usual way that the learned judge's finding that the third party had discharged its duty as owner of the fallen tree was not supported by the evidence.

In my opinion the learned judge had correctly applied the law to the facts of the present case. It is well established that the duty of the appellants as an estate owner was to take such steps as a reasonable and prudent landowner would take, and the question was one of fact whether their conduct infringed this requirement. This was the test adopted by Lords Normand and Reid in *Caminer* v. *Northern & London Investment Trust, Limited*[6] and which was applied in the local case of *Thean Chew* v. *The Seaport (Selangor) Rubber Estate Ltd.*[7] This test postulates not expert knowledge on their part but some degree of knowledge as a reasonable and prudent landowner would possess. Accordingly, an estate owner who has rubber trees growing on his estate adjoining the highway is not expected to possess scientific knowledge of diseases that may affect the trees but he is expected as a reasonable and prudent landowner to inspect the trees from time to time to assess their safety and if there is a danger of one of those trees falling on the highway, and possibly injuring someone who is using the highway, it is his duty to have that tree removed which is found to be dangerous.

It is now necessary to look at the evidence. The estate comprised of 2,900 acres with approximately half a million rubber trees which were 20 years old and in healthy condition. Up to 16 years after planting routine inspection for root and other diseases were carried out. During that period the lateral roots had exploited the whole of the top soil area and there was very little chance of the trees contracting any disease. No one knew precisely at what time the tree fell. But one thing is certain. It fell between 8.30 p.m. and 10.40 p.m. It came from the first row of the second terrace. There was no tree immediately before that tree. The distance from the stump of

the tree to the edge of the road was 45 feet. After it fell its root was inspected but no sign or symptom of root disease was found. That night was the only occasion a rubber tree from this estate had fallen on the highway although there had been cases of branches falling and infringing the highway.

Great play was made as to the size of the head of the tree in question. The manager of the estate was asked the following question: "Q. Knowing that the rain was heavy and there was possibility of trees falling what steps did you take to prevent any tree from falling?" "A. Except for normal inspection to see if there was any tree in danger of toppling we did not take any other step. No special steps were taken. There is no way to tell whether a tree will topple until it topples over."

The issue seems to me to be a broader and more general one, viz., in the case of an apparently healthy rubber tree, ought its owner to have it lopped or topped because either wind or weather condition might cause it to be uprooted? Unless one is to take the view that every rubber tree growing beside a main highway should be lopped and topped and that its owner is guilty of negligence unless he so treats it, I see no reason for imputing a want of care on the part of its owner. But as I understand the judgment of the learned judge, however, he took the view that the tree fell because of weather and wind conditions causing it to be unbalanced and fall, and not because of want of due care on their part to see that the tree was dangerous. It had rained for the past ten days with a recorded rainfall of 6.16 inches for the first seven days of September. But there was nothing exceptional about the rain or the wind that night. There was also nothing exceptional about the canopy or foliage of this particular tree. Apart from the testimony of the manager no evidence of the size of the head was given on behalf of the respondents. I do not regard the evidence as establishing that the rubber tree in question was so plainly a danger as to require it being lopped or topped lest it should fall though it was healthy and regular examination did not raise a doubt as to its general condition. If such a duty existed, there would be a vast number of negligent estate owners who are only saved from liability owing to the chance that their rubber trees have in fact resisted the weather tending to make them fall.

I must approach the question of nuisance on the basis of the learned judge's finding that there was no negligence on the part of the third party in respect of the fallen tree. It was argued that, apart from the issue of negligence, by the mere fact that the tree was left unattended and without any proper warning sign so that it could not be seen, it was a dangerous obstruction in the highway and so a nuisance. Consequently an absolute duty was imposed on the third party to light it or otherwise effectively guard it to prevent accidents.

That is a proposition which I refuse to accept. If a tree adjoining a highway falls on the road without any negligence on the part of its owner, and the said tree causes an obstruction to the said highway, it is wrong to suppose that *ipso facto* and immediately a nuisance is created. The keynote of his responsibility is knowledge or means of knowledge. Thus, a nuisance will obviously be created if, knowing or having the means of knowing of its existence, he allows it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot overnight turn it into a nuisance. Each case must be examined whether or not a nuisance is created. If that were not so, it would seem that every landowner who owns trees adjoining a highway would be turned into an insurer. That in my opinion would run contrary to the recognised law on the question of nuisance to highways. In the present case, the third party having been found not guilty of negligence, there remained nothing but the allegation of nuisance. In my opinion, on the evidence the learned judge was right in not deciding that question. The allegation of nuisance was not satisfied.

The appeal by the appellants against the respondents is allowed with costs here and full costs in the court below.

The appeal by the respondents against the third party is dismissed with costs.

Wan Suleiman and **Chang Min Tat F.JJ.** concurred.

Order accordingly.

Solicitors: *Chor Pee & Hin Hiong; Mah Kok & Din; Shearn Delamore & Co.*

YAP CHEE MENG v. AJINOMOTO (MALAYSIA) BERHAD

[O.C.J. (Harun J.) January 19, 1976]

[Kuala Lumpur — Civil Suit No. 830 of 1975]

Practice and Procedure — Claim for damages based on negligence — Settlement negotiated by solicitors — Whether settlement could be challenged by client — Public policy — Grounds for setting aside settlement.

Legal Profession — Advocate and solicitor — Settlement negotiated by solicitor — Whether could be challenged by client — Public policy — Grounds for setting aside the settlement.

Damages — Claim for — Settlement negotiated by solicitors — Whether client could challenge settlement.

The plaintiff had been injured while performing his work at the factory of the defendants and had been blinded as a result of the accident. He instructed solicitors who arranged a settlement of his claim. The plaintiff subsequently repudiated the settlement and brought an action for damages.

Held: (1) as a general rule it is against public policy to allow settlements between solicitors on behalf of their respective clients in accident cases to be challenged with impunity;

(2) a settlement like other contracts is voidable on specific grounds, as for example, undue influence, misrepresentation, fraud or mistake;

(3) in this case the plaintiff had not shown any such specific grounds and therefore the application of the defendants to strike out the writ of summons must be allowed.

Cases referred to:-

(1) *Filmer* v. *Delber* 128 E.R. 192.
(2) *Mathews* v. *Munster* (1887) 20 Q.B.D. 141.
(3) *Welsh* v. *Rae* (1918) 118 L.T.R. 529.
(4) *Neale* v. *Gordon Lennox* [1902] A.C. 465.